

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN ZIMMERMAN,

) Case Nos.:

Plaintiff,

VS.

GJS GROUP, INC.,

Defendant.

VS.

STATE OF NEVADA, ex rel. ADAM PAUL
LAXALT, Attorney General,

Defendant-Intervenor.

And related cases.

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ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 58), filed by Intervenor State of Nevada (“Intervenor”), to which Defendants Snowed Inn., Inc., Snowed Inn, LLC, WBF McDonalds Management, LLC (“WBF McDonalds”), Starbucks Corp., Speedee Mart,

1 Inc., and Sarah Siavash (“Siavash”) filed joinders, (ECF Nos. 60–63). Plaintiff Kevin
2 Zimmerman (“Plaintiff”) filed a Response, (ECF No. 69), and Intervenor filed a Reply, (ECF
3 No. 70), to which Snowed Inn, Inc., Snowed Inn, LLC, WBF McDonalds, and Siavash filed
4 joinders, (ECF Nos. 71, 72). For the reasons discussed herein, Intervenor’s Motion is
5 **GRANTED.**

6 **I. BACKGROUND**

7 These cases arise out of alleged violations of the Americans with Disabilities Act
8 (“ADA”), 42 U.S.C. § 12101, *et seq.*, and a series of lawsuits filed by Plaintiff against various
9 defendant-entities in the Las Vegas, Nevada area. Plaintiff’s Complaints¹ contain the following
10 allegations.

11 Defendants own and operate places of public accommodation (“PPAs”) as defined under
12 42 U.S.C. § 12181(7). (Compl. ¶ 1, ECF No. 1-1). Plaintiff is an individual with disabilities
13 that substantially limit his major life activities as his “health and mobility is dependent on the
14 use of a wheelchair.” (*Id.* ¶ 7). Plaintiff alleges that he is a customer of Defendants’ PPAs
15 where he visited to enjoy the goods and services offered. (*Id.* ¶ 9). According to Plaintiff’s
16 Complaints, “[c]ompletely independent of [Plaintiff’s] personal desire to access the PPA[s],
17 Plaintiff also acted as a tester for purposes of discovering, encountering, and engaging
18 discrimination against persons with disabilities at Defendant[s’] PPA[s].” (*Id.* ¶ 11).

19 During Plaintiff’s visits to Defendants’ PPAs, Plaintiff alleges he was “prevented from
20 the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or
21 accommodations” due to alleged violations of the ADA and its accompanying regulations. (*Id.*
22 ¶¶ 30–31). In each of Plaintiff’s Complaints, he identifies at least one way in which the PPA in
23 question is ADA non-compliant. (*See, e.g., id.* ¶ 31) (“Failure to provide the clear width of
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25 ¹ The Complaints are identical except for the access barriers that Plaintiff alleges violate the ADA and its
corresponding regulations. Accordingly, the Court’s citations are to the initial Complaint in *Zimmerman v. GJS
Grp., Inc.*, No. 2:17-cv-00304-GMN-GWF (D. Nev. 2017), unless otherwise indicated.

1 walking surfaces in aisles and pathways no less than 36 inches” and “[f]ailure to provide signs
2 containing the designation ‘van accessible’ that identify van parking spaces.”). According to
3 Plaintiff, he “intends to visit Defendants’ [PPAs] several times per year in the near future, but is
4 deterred from doing so while Defendant[s’] PPA[s] violate[] the ADA.” (*Id.* ¶ 45). Plaintiff
5 seeks, *inter alia*, a preliminary and permanent injunction requiring Defendants to remove all
6 alleged access barriers and an award of attorneys’ fees, including litigation expenses and costs.
7 (*Id.* 10:24–11:12).

8 On February 28, 2017, the Court issued an omnibus order transferring more than seventy
9 of Plaintiff’s cases to the undersigned and the Honorable Magistrate Judge George Foley. *See*
10 *Zimmerman v. Nevada CVS Pharmacy, LLC*, No. 2:17-cv-00307-GMN-GWF (D. Nev. 2017)
11 (Omnibus Transfer Order, ECF No. 5). The Court reasoned that the “allegations in each of
12 these cases are nearly identical,” and that “judicial economy will be served” by transferring all
13 of the cases to a single district court judge and magistrate judge. (*Id.* 1:26–2:3).

14 On August 8, 2017, Intervenor filed a motion to intervene as a limited-purpose
15 defendant, (ECF No. 28), which Judge Foley subsequently granted on October 11, 2017, (ECF
16 No. 35). On October 17, 2017, Intervenor filed a motion to consolidate, (ECF No. 37), which
17 the Court granted for the limited purpose of determining subject matter jurisdiction. (*See* Order
18 6:10–13, ECF No. 57). Specifically, the Court consolidated the actions to permit Intervenor to
19 assert a facial challenge to Plaintiff’s Article III standing based on common allegations or
20 omissions in Plaintiff’s Complaints. (*Id.* 5:11–13). Pursuant to the Court’s Order, Intervenor
21 filed the instant Motion to Dismiss on April 16, 2018, (ECF No. 58).

22 **II. LEGAL STANDARD**

23 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
24 lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction is
25 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *See Scott*

1 *v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke the
2 court’s jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly, the
3 court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in
4 response to a motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377
5 (1994).

6 A motion to dismiss under Rule 12(b)(1) may be construed in one of two ways.
7 *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It
8 may be described as “factual,” meaning that it “attack[s] the existence of subject matter
9 jurisdiction in fact.” *Id.* Alternatively, it may be described as “facial,” meaning that it “accepts
10 the truth of the plaintiff’s allegations but asserts that they are ‘insufficient on their face to
11 invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting
12 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). “The district court
13 resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the
14 plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s favor, the
15 court determines whether the allegations are sufficient as a legal matter to invoke the court’s
16 jurisdiction.” *Id.* Courts do not, however, “accept the ‘truth of legal conclusions merely
17 because they are cast in the form of factual allegations.’” *Doe v. Holy See*, 557 F.3d 1066, 1073
18 (9th Cir. 2009) (quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
19 2003)).

20 **III. DISCUSSION**

21 Intervenor moves to dismiss Plaintiff’s Complaints, as well as Plaintiff’s Amended
22 Complaint,² on the basis that Plaintiff fails to establish an injury in fact sufficient to confer
23 Article III standing. (Mot. to Dismiss (“MTD”) 5:18–14:5, ECF No. 58). Plaintiff responds
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25 ² Plaintiff filed an Amended Complaint in *Zimmerman v. GJS Grp., Inc.*, 2:17-cv-0304-GMN-GWF (ECF No. 55).

1 that Intervenor “seeks to impose a heightened pleading standard on Plaintiff,” and that the
2 Complaints’ allegations are “sufficient to place [Intervenor] and the Consolidated Defendant’s
3 [sic] on notice of how its architectural barriers deprive Plaintiff of equal access.” (Resp. 10:17–
4 12:17, ECF No. 69).

5 “[T]o invoke the jurisdiction of the federal courts, a disabled individual claiming
6 discrimination must satisfy the case or controversy requirement of Article III by demonstrating
7 his standing to sue at each stage of the litigation.” *Chapman v. Pier 1 Imps., Inc.*, 631 F.3d 939,
8 946 (9th Cir. 2011) (citing U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S.
9 555, 560 (1992)). To establish standing, a plaintiff must “demonstrate that he has suffered an
10 injury-in-fact, that the injury is traceable to the [defendant’s] actions, and that the injury can be
11 redressed by a favorable decision.” *Chapman*, 631 F.3d at 946.

12 An injury in fact requires that a plaintiff plead “an invasion of a legally protected interest
13 which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or
14 hypothetical.” *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). In the
15 ADA context, for an injury to be concrete and particularized, a plaintiff must identify access
16 barriers that preclude him from “full and equal enjoyment of the facility on account of his
17 particular disability.” *Chapman*, 631 F.3d at 947. An actual and imminent threat of repeated
18 injury can be shown in one of two ways. *Id.* at 949. First, a plaintiff may demonstrate an intent
19 to return to a noncompliant accommodation. *Id.* Alternatively, a plaintiff “suffers a cognizable
20 injury if he is deterred from visiting a noncompliant public accommodation because he has
21 encountered barriers related to his disability there.” *Id.*; *Ervine v. Desert View Reg’l Med. Ctr.*
22 *Holdings, LLC*, 753 F.3d 862, 867 (9th Cir. 2014).

23 Intervenor argues that Plaintiff fails to satisfy the injury in fact requirement because
24 Plaintiff does not relate the alleged ADA barriers to his particular disability. (MTD 6:12–7:6).
25 Therefore, according to Intervenor, Plaintiff cannot establish a concrete and particularized

1 injury or a real and immediate threat of future injury. (*Id.* 7:8–10:5, 11:8–12:16). The Court
2 agrees.

3 In *Chapman*, the Ninth Circuit held that a plaintiff lacked standing to pursue his ADA
4 claims because his complaint failed to “identify how any of the alleged violations threatens to
5 deprive him of full and equal access due to his disability if he were to return to the [PPA], or
6 how any of [the barriers] deter him from visiting the [PPA] due to his disability.” *Chapman*,
7 631 F.3d at 955. In that case, the plaintiff “attached to his complaint an ‘Accessibility Survey,’
8 which listed barriers known to him that he claim[ed] ‘denied him access to the [PPA], or which
9 he seeks to remove on behalf of others under related state statutes.” *Id.* at 954. Such a list, the
10 Ninth Circuit concluded, “cannot substitute for the factual allegations required in the complaint
11 to satisfy Article III’s requirement of an injury-in-fact.” *Id.* at 954–55.

12 Here, Plaintiff’s Complaints list accessibility barriers without any corresponding facts
13 connecting the alleged barriers to his disability. As in *Chapman*, Plaintiff “does not even
14 attempt to relate the alleged violations to his disability.” 631 F.3d at 955. For example, in
15 several Complaints, Plaintiff alleges a “[f]ailure to provide the clear width surface aisles and
16 pathways no less than 36 inches” and “[f]ailure to provide signs containing the designation ‘van
17 accessible’ that identify van parking spaces.” *See, e.g., Zimmerman v. GJS Grp., Inc.*, No. 2:17-
18 cv-0304-GMN-GWF (Compl. ¶ 31, ECF No. 1-1); *Zimmerman v. Snowed Inn, Inc.*, No. 2:17-
19 cv-0595-GMN-GWF (Compl. ¶ 31, ECF No. 1-1); *Zimmerman v. J&M Sales, Inc.*, No. 2:17-
20 cv-1302-GMN-GWF (Compl. ¶ 31, ECF No. 1); *Zimmerman v. WTS Invs., LLC*, No. 2:17-cv-
21 1209-GMN-GWF (Compl. ¶ 31, ECF No. 1). Despite initially identifying these alleged access
22 barriers, Plaintiff fails to state how, or whether, the alleged barriers affected Plaintiff “*on*
23 *account of his particular disability*.” *Chapman*, 631 F.3d at 947 (emphasis added). Plaintiff
24 does not allege, for example, that he was prevented from navigating his way through the aisles,
25 unable to locate a parking spot on account of his disability, or otherwise impacted by

1 Defendants’ alleged failure to maintain ADA-compliant facilities. Absent any allegation
2 linking the alleged barriers to Plaintiff’s disability, the Court cannot discern whether Plaintiff
3 personally suffered discrimination under the ADA on account of his disability and,
4 consequently, whether Plaintiff is deterred from patronizing Defendants’ PPAs based on his
5 disability. *See id.* at 949 (“Article III . . . requires a sufficient showing of likely injury in the
6 future related to the plaintiff’s disability to ensure that injunctive relief will vindicate the rights
7 of the particular plaintiff rather than the rights of third parties.”). Accordingly, the Court finds
8 that Plaintiff has not established an injury in fact and, therefore, Intervenor’s Motion is granted
9 with respect to Plaintiff’s initial Complaints.

10 Consistent with this reasoning, the Court finds that Plaintiff’s Amended Complaint,
11 (ECF No. 55), also fails to establish Article III standing. In the Amended Complaint, Plaintiff
12 inserts four new paragraphs, none of which cures the deficiencies highlighted *supra*. Relevant
13 to the injury-in-fact question, Plaintiff includes the following new allegation: “Plaintiff arrived
14 at Defendant’s PPA on the above-mentioned date, by means of a wheelchair-accessible
15 mobility van.” (Am. Compl. ¶ 11). In that case, Plaintiff alleges the following access barriers:
16 “[f]ailure to provide the clear width of walking surfaces in aisles and pathways,” “[f]ailure to
17 provide signs containing the designation ‘van accessible’ that identify van parking spaces,” and
18 “[f]ailure to make reasonable modifications in policies, practices, or procedures necessary to
19 accommodate for Plaintiff’s disability.” (*Id.* ¶ 33).

20 Again, however, Plaintiff merely identifies these barriers without any statement linking
21 his disability to the alleged barriers, or suggesting how these barriers deter him from future
22 patronage of the PPA. Pursuant to *Chapman*, courts in this Circuit hold that this is insufficient
23 to establish an injury in fact. *See, e.g., Gastelum v. Canyon Hosp. LLC*, No. 17-cv-02792-PHX-
24 GMS, 2018 WL 2388047, at * 9 (D. Ariz. May 25, 2018) (“Although the specific alleged
25 violations vary from complaint to complaint . . . [e]ach complaint details dozens of alleged

1 violations without relating the violations to [the plaintiff’s] disability.”); *Allison v. Spring*
2 *Mountain Las Vegas, LLC*, No. 2:15-cv-2337-JCM-PAL, 2016 WL 4474126, at *3 (D. Nev.
3 Aug. 23, 2016) (“[P]laintiff’s complaint alleges that plaintiff visited defendant’s complex and
4 encountered barriers to access However, a plaintiff must allege more than encountering an
5 ADAAG barrier to establish standing.”). *Cf. Kohler v. CJP, Ltd.*, 818 F. Supp. 2d 1169, 1174
6 (C.D. Cal. 2011) (distinguishing *Chapman* and concluding that “[the plaintiff] provide[d]
7 similarly sufficient explanations with respect to the remaining barriers identified in the
8 complaint, detailing how each barrier affects him because of his disability and how each
9 impedes his ability to make full use of the [PPA].”); *Twede v. Univ. of Wash.*, No. 16-cv-1761-
10 JLR, 2018 WL 835705, at *6 (W.D. Wash. Feb. 13, 2018) (“Here, Plaintiffs do more than
11 merely identify barriers that they encountered at the parking lots they visited; they also briefly
12 describe how each barrier affects them because of their disabilities.”). Accordingly, the Court
13 dismisses Plaintiff’s Amended Complaint without prejudice for lack of Article III standing.³

14 Plaintiff argues that “requiring Plaintiff to give detailed factual allegations at the
15 pleading stage circumvents the available tools of discovery.” (Resp. 14:9–11, ECF No. 69).
16 Plaintiff’s assertion, however, is belied by the fact that in his Response, and for the first time,
17 Plaintiff discusses the link between his disability and the alleged access barriers. (Resp. 5:19–
18 6:15). Plaintiff’s Response, however, cannot cure for his failure to include sufficient facts in
19 his Complaints.

20 Based on the foregoing, the Court finds that Plaintiff has failed to establish an injury in
21 fact sufficient to support Article III standing. Accordingly, Intervenor’s Motion to Dismiss is
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23 ³ In three cases, Plaintiff filed a Motion for Leave to File an Amended Complaint. *See Zimmerman v. Siavash*,
24 2:17-cv-0560-GMN-GWF (ECF No. 31); *Zimmerman v. Snowed Inn, Inc.*, 2:17-cv-0563-GMN-GWF (ECF No.
25 23); *Zimmerman v. Snowed Inn, Inc.*, 2:17-cv-0595-GMN-GWF (ECF No. 35). The proposed amended
complaints incorporate the same four paragraphs that this Court deems insufficient to establish standing with
respect to the instant Amended Complaint in *Zimmerman v. GJS Grp., Inc.*, 2:17-cv-0304-GMN-GWF (ECF No.
55). The Court therefore finds that granting Plaintiff leave to file these amended complaints would be futile.
Accordingly, the Court denies these Motions without prejudice.

1 granted and Plaintiff's Complaints and Amended Complaint are hereby dismissed without
2 prejudice.

3 **IV. LEAVE TO AMEND**

4 Plaintiff requests that "leave to amend should be granted to allow Plaintiff to meet the
5 pleading requirements set forth in *Chapman*." (Resp. 20:19–20). Rule 15(a)(2) of the Federal
6 Rules of Civil Procedure permits courts to "freely give leave [to amend] when justice so
7 requires." Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has "repeatedly held that 'a district court
8 should grant leave to amend even if no request to amend the pleading was made, unless it
9 determines that the pleading could not possibly be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d
10 494, 497 (9th Cir. 1995)).
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12 Plaintiff asserts that he will attach declarations to his amended complaints and provide
13 further factual support with respect to "his physical disability, how each ADA barrier denied
14 him full and equal enjoyment at each PPA, and additional facts to support standing under
15 *Chapman*." (Resp. 28:6 n.15). The Court is satisfied that Plaintiff may be able to cure the
16 deficiencies discussed in this Order by amending his Complaints. Accordingly, if Plaintiff
17 elects to do so, Plaintiff shall file new amended complaints in the above-captioned actions
18 within thirty (30) days of this Order.

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1 **V. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Intervenor's Motion to Dismiss, (ECF No. 58), is
3 **GRANTED** pursuant to the foregoing. Plaintiff's Complaints in the above-captioned actions
4 are hereby **DISMISSED without prejudice**.

5 **IT IS FURTHER ORDERED** that Intervenor's Motion, as it pertains to Plaintiff's
6 Amended Complaint in 2:17-0304-GMN-GWF (ECF No. 55), is **GRANTED**.

7 **IT IS FURTHER ORDERED** that Plaintiff's Motions for Leave to File an Amended
8 Complaint in Case Nos. 2:17-cv-0560-GMN-GWF (ECF No. 31); 2:17-cv-0563-GMN-GWF
9 (ECF No. 23); and 2:17-cv-0595-GMN-GWF (ECF No. 35), are **DENIED without prejudice**.

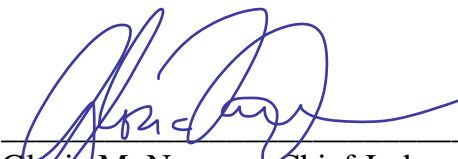
10 **IT IS FURTHER ORDERED** that if Plaintiff chooses to do so, Plaintiff shall file new
11 Amended Complaints in these actions within thirty (30) days of this Order. Failure to do so
12 will result in dismissal of the above-captioned cases with prejudice.

13 **IT IS FURTHER ORDERED** that stays entered in Case Nos. 2:17-cv-0304-GMN-
14 GWF; 2:17-cv-0307-GMN-GWF; 2:17-cv-0563-GMN-GWF; 2:17-cv-0595-GMN-GWF; 2:17-
15 cv-0973-GMN-GWF; 2:17-cv-0974-GMN-GWF; 2:17-cv-1194-GMN-GWF; and 2:17-cv-
16 1358-GMN-GWF are hereby **LIFTED**.

17 **IT IS FURTHER ORDERED** that the parties shall file Proposed Discovery Plans/
18 Scheduling Orders in the above-captioned cases within sixty (60) days of this Order.

19 **DATED** this 30 day of August, 2018.

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Gloria M. Navarro, Chief Judge
United States District Judge